



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 6
1445 ROSS AVENUE
DALLAS, TEXAS 75202-2733

March 5, 2020

Mr. Mark Pattillo
Corpus Christi Field Office
Regulatory Division, CESWG-RD-R
U.S. Army Corps of Engineers
5151 Flynn Parkway, Suite 306
Galveston, Texas 78411-4318

Dear Mr. Pattillo:

The Environmental Protection Agency (EPA) Region 6 has reviewed Public Notice (PN) SWG-1995-02221, dated February 6, 2020. The applicant, Moda Ingleside Oil Terminal, LLC, proposes to expand and improve existing marine basins and berthing facilities in Corpus Christi Bay. EPA is providing the following comments for use in reaching a decision relative to compliance with the EPA's *404(b)(1) Guidelines for the Specification of Disposal Sites for Dredged or Fill Material* (Guidelines) (40 CFR Part 230).

Upon review of the current proposal, it is unclear whether the information provided by the applicant on the proposed project will sufficiently enable the Corps to make a legally defensible permit decision in regard to compliance with the Guidelines. Under the Guidelines, no discharge of dredged or fill material may be permitted by the Corps if: (1) a practicable alternative exists that is less damaging to the aquatic environment so long as that alternative does not have other significant adverse environmental consequences or (2) the nation's waters would be significantly degraded. Under the Guidelines, a project must incorporate all appropriate and practicable measures to first avoid impacts to wetlands, streams, and other aquatic resources and then minimize unavoidable impacts; after avoidance and minimization measures have been applied, the project must include appropriate and practicable compensatory mitigation for the remaining unavoidable impacts.

According to the PN, the applicant has stated that they have avoided and minimized the environmental impacts by project alterations, design changes, stabilization features and use of best management practices. While those activities are meaningful, the PN does not discuss the range of practicable alternatives that were considered for this project including a combination of alternatives or the no action alternative. An alternative is practicable if it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purpose. As provided in the PN, the range of project footprint options or operational procedures evaluated and associated aquatic impacts for those alternatives are unclear. It is also unclear if the scope of a single and complete project has been included as the proposed project does not include any information regarding onshore facilities, supply pipelines or other necessary appurtenances and infrastructure that may be necessary for facility operation. If it has not yet done so, we recommend that the applicant submit an alternatives analysis to

the Corps that evaluates the respective impacts of any practicable alternatives that meet the project purpose.

Additionally, it does not appear that compliance with the requirements of Section 230.10(c) of the Guidelines has not been clearly demonstrated. Section 230.10(c) requires that no discharge of dredged or fill material shall be permitted which will cause or contribute to significant degradation of the waters of the United States. The Guidelines explicitly require evaluation of all direct, secondary and cumulative impacts reasonably associated with the proposed discharge in determining compliance with Section 230.10(c). In determining significant degradation, the Guidelines direct consideration of effects on such functions and values as wildlife habitat, aquatic ecosystem diversity, stability and productivity, recreation, aesthetics, and economic values.

As provided in the PN, the information provided by the applicant does not appear to adequately reflect consideration of all potential direct, secondary, and cumulative impacts to these functions and values for each of the alternatives considered. The PN does not clearly identify the areas of aquatic impacts nor is the quality or value of those impacts fully described. It is unclear if possible environmental losses related the impacts upon aquatic ecosystems, nearby seagrasses and aquatic organisms have been fully evaluated. Seagrasses play critical roles in the coastal environment by providing nursery habitat for estuarine fisheries, serving as a major source of organic biomass for coastal food webs, contributing to the stabilization of shorelines and sediment to reduce coastal erosion and improve water clarity, as well as contributing to nutrient cycling and water quality processes. If the applicant has not already done so, the EPA recommends the applicant evaluate contemporary contaminant testing of dredged material prior to any disposal activities as the dredged material originates from an industrial area. The EPA supports the beneficial use of dredged material if material is suitable and free of toxic pollutants. The provided information should also assist the Corps in making its factual determinations for compliance or non-compliance with the 404(b)(1) Guidelines based upon the final single and complete project being identified. Please note that providing this material after public review does not allow optimum analysis of the entire range of significant potential environmental impacts.

Regarding compensatory mitigation, the applicant has proposed a conceptual permittee-responsible mitigation approach that includes preservation of forested land that includes a mosaic of non-jurisdictional pothole wetlands and a separate location for the creation of submerged aquatic vegetation (seagrasses). As currently proposed, it does not appear the function for the types and quantities of aquatic resources impacted by the proposed project would be adequately replaced. For unavoidable impacts to aquatic resources, the 2008 Final Mitigation Rule states in Section 230.93(c)(1)(i) that for individual permits, the permittee must prepare a draft mitigation plan and submit it to the district engineer for review. The required elements include: objectives, site selection, site protection, baseline information, determination of credits, mitigation workplan, maintenance plan, performance standards, monitoring requirements, long-term management plan, adaptive management plan, financial assurances and other information as required by the district engineer. While it is not required to submit this complete plan at the time of the PN, providing additional details at the earliest stage possible allows the public and commenting agencies to have a more complete understanding of the net impacts of the proposal, taking into account mitigation.

Specific to the conceptual mitigation statement provided with the PN, there are concerns with the out-of-kind mitigation through preservation proposed for the emergent estuarine (EEM) wetlands. While the

value of the forested land that includes a mosaic of pothole wetlands certainly holds ecological value, it would not replace the lost EEM wetlands. It would appear the proposed pothole wetlands are not jurisdictional, the quantity and quality of the identified pothole wetlands are not described, eastern portions of the adjacent property appear to be of higher ecological value, and the footprint identified for preservation may result in a disjointed landscape position if surrounding areas are developed. Furthermore, for preservation to be used as compensatory mitigation, 40CFR230.93(h) establishes criteria that must be met.

In terms of an overall mitigation approach, the 2008 Final Mitigation Rules assigns a low priority to preservation. Enhancement is also preferred over creation due to the higher likelihood of success. For the seagrass creation component, additional design elements (location, breakwater design, impacts to hydrodynamics) would be needed. Mitigation success criteria and monitoring requirements should also be sufficiently robust to ensure the mitigation approaches effectively compensate for the significant projects impacts to aquatic resources within a timely manner. The plan should clearly address how the created and preserved resources will be maintained in perpetuity. Furthermore, it is unclear as to whether temporal losses have been addressed, especially for seagrass impacts, as it is unclear how mitigation project timing and achievement of success criteria compare to the proposed project construction. Given the inherent difficulties associated with restoration techniques for seagrasses, it is even more critical to avoid and minimize impacts to the greatest extent possible.

In summary, the EPA recommends the Corps work with the applicant to enhance the information provided to assist the Corps in determining compliance with the Guidelines especially in regard avoidance and minimization measures and the evaluation of all direct, secondary, and cumulative impacts of the proposed project. Additionally, the EPA recommends the Corps work with the applicant to develop a mitigation plan to address all unavoidable impacts to seagrasses, tidal flats and wetlands. Thank you for the opportunity to review and comment on this PN, and if you have any questions on these comments, please contact Paul Kaspar of my staff, at kaspar.paul@epa.gov or 214-665-7459.

Sincerely,

A handwritten signature in black ink, appearing to read "Mark Hayes", with a stylized, cursive script.

Mark A. Hayes, Chief
NPDES/Wetlands Review Section

cc: U.S. Fish and Wildlife Service, Corpus Christi, TX
National Marine Fisheries Service, Galveston, TX
Texas Commission on Environmental Quality, Austin, TX
Texas Parks and Wildlife Department, Corpus Christi, TX